A.F.R.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Civil Revision No.186 of 2006

Applicant Defendant No.2

Suresh Tiwari, S/o Late Shri Ram Sanehi Tiwari, aged about 52 years, R/o Bemetara, Tehsil – Bemetara, Distt. Durg (Chhattisgarh)

versus

Non-applicants

1. Smt. Shanta Tiwari, Wd/o Late Shri Ram Sanehi Tiwari, aged about 82 years, R/o Bemetara, Mohbhattha Road, In front of Bijli Office, Tehsil – Bemetara, Distt. Durg (CG)

   Plaintiff

2. Harshwardhan Tiwari S/o Late Shri Mahesh Tiwari, aged about 32 years, R/o Bemetara, Tehsil – Bemetara, Distt. Durg (CG)

   Defendant 1

3. Smt. Sharda Tiwari, Wd/o Late Shri Mahesh Tiwari, aged about 50 years, House Wife

4. Sweta Tiwari, D/o Late Shri Mahesh Tiwari, aged about 22 years,

5. Sapna Tiwari, D/o Late Shri Mahesh Tiwari, aged about 31 years,

   (Sl.No.3 to 5 R/o Durg, MIG-20, Padmanabhpur, Distt. Durg (CG)

6. Dr. Naresh Tiwari, S/o Late Shri Ram Sanehi Tiwari, aged 56 years, Doctor, Govt. Hospital, Bemetara, Distt. Durg (CG)

7. Sanjeev Tiwari, S/o Late Shri Sheshnarayan Tiwari, aged about 35 years, R/o Raipur Road, Bemetara, Tehsil – Bemetara, Distt. Durg (CG)

   Defendants 3 to 7

(61)

Civil Revision under Section 115 of the Code of Civil Procedure, 1908

Present : Shri Sanjay S. Agrawal, counsel for the applicant.
Shri Sanjay K. Agrawal with Shri Anand Kumar Tiwari, counsel for non-applicant No.1.
Shri Arvind Kumar Dubey, counsel for non-applicants No.6 and 7.

ORAL ORDER

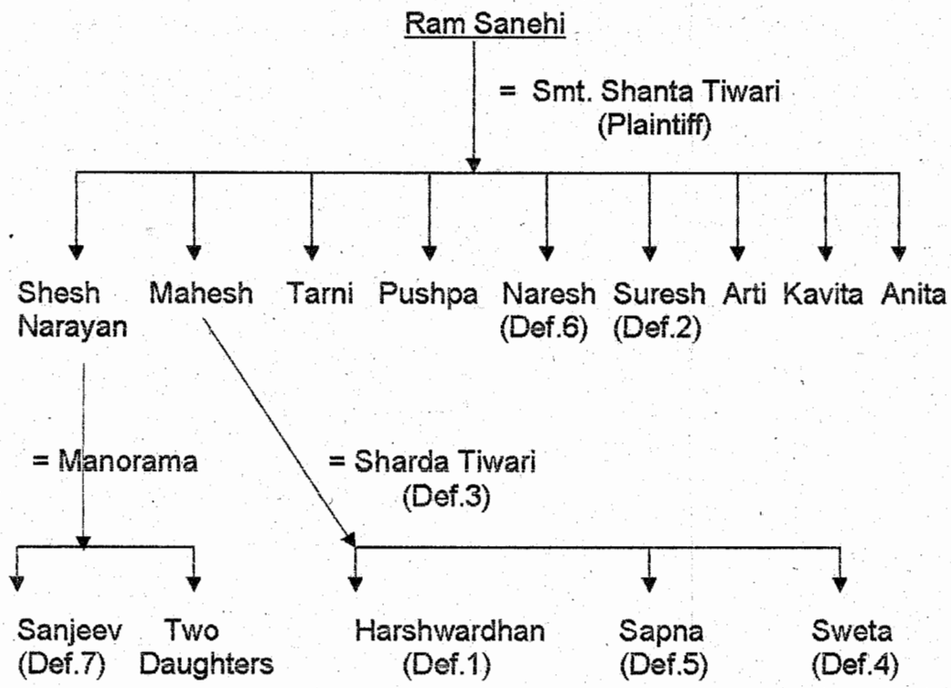
(Passed on 25th July, 2007)

Heard.

(2) It is an irony of fate that a mother, aged 82 years, is required to file a suit against her own sons for declaration of title and permanent injunction of a house in which she resides. It is equally disturbing to note that although the five daughters and one son are supporting the case of the old mother, it is the applicant/defendant No.2 who is hotly contesting against his very old mother, perhaps to repay matru-rin.

(3) Aggrieved by the order dated 25.11.2006 passed by Smt. Ranu Divekar, Additional District Judge, Bemetara in Civil Suit No.4-A of 2005 deciding the preliminary issue No.4 relating to non-joinder of necessary parties against him, the applicant/defendant No.2 has preferred this civil revision.

(4) Admittedly, the genealogical tree showing the relationship between the parties is as under:



(5) Non-applicant No.1/plaintiff Smt. Shanta Tiwari had instituted a Suit claiming declaration of title and permanent injunction, alleging *inter alia* that the suit house and plot bearing Khasra No.544/1 and 544/2 admeasuring 0.081 hectare and 0.024 hectare respectively situated at village Bemetara described detailed in plaint schedule "A", was purchased from the income of the Joint Hindu Family property by a registered deed of sale dated 21.11.1968 in the name of her sons namely Mahesh Tiwari and Suresh Tiwari. It was further pleaded that the suit house / plot fell to her share and her husband Ram Sanehi in a partition effected on 24.1.1972 and on 29.07.1974. It was pleaded that she is not bound by any terms and conditions, if stipulated in the alleged deed regarding her limited right. It was stated further that the defendants No. 6 & 7, namely Naresh Tiwari and Sanjeev Tiwari had filed an application for mutation before the Tehsildar, Bemetara in respect of the suit house. The Tahsildar, Bemetara in the said Revenue Case No. 39-A/6/2003-04, directed for recording the name of

defendant No.1 and defendants No.3 to 5 giving rise to the suit for declaration of title and in the alternative also praying for declaration that the plaintiff is not bound by the terms and conditions as stipulated in the alleged deed and for permanent injunction for restraining the defendants from misappropriation of the suit house/plot.

(6) The defendant No.2/applicant contested the suit by denying the alleged deed of partition and submitting *inter alia* that his father late Shri Ram Sanehi had purchased the houses and plots apart from the suit house and plot in the name of all his sons and thus separated them orally and that as per the said arrangement defendant Mahesh Tiwari and he started residing in the suit house since the date of its purchase along with his mother and therefore they alone are in exclusive possession over the suit house. It was further pleaded that if it was found that the suit house came into the share of his father, then in such circumstances also, it would be divided among all his heirs upon his death and therefore plaintiff being a coparcener cannot claim her absolute right upon the suit house. It was further pleaded that the five daughters of the non-applicant No.1/plaintiff Smt. Shanta Tiwari were necessary parties to the suit.

(7) On the basis of the aforesaid pleadings, the trial Court framed issue No.4 as under:

> "Whether daughters of deceased Ramsanehi are necessary parties?"

(8) The learned Additional District Judge answered the issue against the applicant/defendant on the ground that all the five daughters had filed affidavit in support of the pleadings of their mother in the suit. On

this premise, a finding was recorded that the five daughters of the non-applicant No.1/plaintiff Smt. Shanta Tiwari were not necessary parties in the suit.

(9) Shri Sanjay S. Agrawal, learned counsel for the applicant strenuously placed reliance on ***Kanakarathanammal*** **vs.** ***V.S. Loganatha Mudaliar and another,*** **AIR 1965 SC 271** and ***Rajabibi and others*** **vs.** ***S. Ameerali and another,*** **AIR 1974 Karanatak 115** while arguing that since the non-applicant No.1/plaintiff had claimed the relief of declaration of her being the exclusive owner of the suit property, her daughters were necessary parties to the suit. It was argued that the question whether the non-applicant No.1/plaintiff was the sole owner of the suit property could not be adjudicated in the absence of necessary parties, i.e., daughters of the non-applicant No.1/plaintiff.

(10) On the other hand, Shri Sanjay K. Agrawal with Shri Anand Kumar Tiwari, learned counsel for the non-applicant No.1/plaintiff argued in support of the impugned order and while placing reliance on ***Shiv Shakti Co-op. Housing Society, Nagpur*** **vs.** ***M/s Swaraj Developers and others,*** **AIR 2003 SC 2434** submitted that there being no jurisdictional error in the impugned order, apparent on the face of it, revisional jurisdiction under Section 115 of the Code of Civil Procedure (henceforth 'the Code') ought not to be invoked. It was further contended that neither the suit was for partition nor for delivery of possession. Besides, all the five daughters of the non-applicant No.1/plaintiff had filed affidavit in support of the claim of the non-applicant No.1/plaintiff. Non-applicants No.6 and 7/defendants had also

supported the case of the non-applicant No.1/plaintiff. It was argued that the question of addition of parties is not a question of initial jurisdiction of the Court, but of a judicial discretion which has been exercised properly by the learned Additional District Judge and, therefore, no interference in exercise of revisional jurisdiction under Section 115 of the Code was called for. Reliance was further placed on ***Ramesh Hirachand Kundanmal*** vs. ***Municipal Corporation of Greater Bombay and others,*** **(1992) 2 SCC 524,** ***Kasturi*** vs. ***Iyyamperumal and others*****, (2005) 6 SCC 733,** ***Amit Kumar Shaw and another*** vs. ***Farida Khatoon and another,*** **(2005) 11 SCC 403** and ***Prem Lala Nahata and another*** vs. ***Chandi Prasad Sikaria,*** **(2007) 2 SCC 551.**

(11) I have considered the rival submissions with utmost circumspection. Order 1 Rule 10 of the Code is as follows:

> **"O.1 R.10 : Suit in name of wrong plaintiff.** – (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.
>
> (2) **Court may strike out or add parties.** – The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been

joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) **Where defendant added, plaint to be amended.** – Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

(12) In ***Ramesh Hirachand Kundanmal*** **vs.** ***Municipal Corporation of Greater Bombay and others*** (supra), the Apex Court has drawn a clear distinction between a necessary party and a proper party and has held as under:-

"6. Sub-rule (2) of Rule 10 gives a wide discretion to the Court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question of impleadment of a party has to be decided on the touchstone of Order 1 Rule 10 which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is

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necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case."

"10. The power of the Court to add parties under Order 1 Rule 10 CPC, came up for consideration before this Court in *Razia Begum* v. *Anwar Begum, [1959 SCR 1111]*. In that case it was pointed out that the courts in India have not treated the matter of addition of parties as raising any question of the initial jurisdiction of the Court and that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it be the questions relating to movable or immovable property."

"14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore,

necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. ....."

(13) In ***Amit Kumar Shaw and another*** vs. ***Farida Khatoon and another*** (supra), the Apex Court held as under:

"9. The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and *bona fide* claimants from being non-suited. The power to strike out or add parties can be exercised by the court at any stage of the proceedings. Under this rule, a person may be added as a party to a suit in the following two cases:

(1) when he ought to have been joined as plaintiff or defendant, and is not joined so, or

(2) when, without his presence, the questions in the suit cannot be completely decided."

"10. The power of a court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will necessarily include an enforceable legal right."

(14) In ***Kasturi*** vs. ***Iyyamperumal and others*** (supra), two tests were laid down by the Apex Court for determining the question as to who is a necessary party. The Apex Court held as under:

"7. In our view, a bare reading of this provision, namely,

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second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are – (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party."

(15) In ***Prem Lala Nahata and another*** **vs.** ***Chandi Prasad Sikaria*** (supra), the Apex Court while considering the scope of Order 1 observed as under:

"15. It is well understood that procedure is the handmaid of justice and not its mistress. The scheme of Order 1 and Order 2 clearly shows that the prescriptions therein are in the realm of procedure and not in the realm of substantive law or rights. ..... In the context of these provisions with particular reference to the rules in Order 1 and Order 2 of the Code, it is clear that an objection of misjoinder of plaintiffs or misjoinder of causes of action, is a procedural objection and it is not a bar to the entertaining of the suit or the trial and final disposal of the suit. ....."

(16) Section 115 of the Code provides as under :

"**115. Revision.** – (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears–

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation. – In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

(17) It is thus clear that the High Court while exercising revisional jurisdiction under Section 115 of the Code would not interfere unless there is a jurisdictional error of one of the three types mentioned in clauses (a), (b) and (c) of sub-section (1) of Section 115 of the Code. In the present case, it is not in dispute that the non-applicant No.1/plaintiff is residing in the suit accommodation. Since a cloud has been cast upon her title by the mutation of the names of defendants No.2 to 5, non-applicant No.1/plaintiff had filed suit for a declaration simplicitor that she was the owner of the suit property. Neither partition nor possession of the suit property was claimed and except the five daughters of the non-applicant No.1/plaintiff, namely, Tarni, Pushpa, Arti, Kavita and Anita, the other sons and grand sons and grand daughters were parties to the suit. No relief was claimed against her daughters by the non-application No.1/plaintiff. Not only this Tarni, Pushpa, Arti, Kavita and Anita had furnished affidavits in support of the suit filed by their mother. Even the non-applicants/defendants No.6 and 7, i.e., the son and grand son of the non-applicant No.1/plaintiff were supporting the case of the plaintiff. Under these circumstances, the questions involved in the suit could be effectively decided without the five daughters being joined as a party for the simple reason that they were not only supporting the case of the plaintiff, but had also filed affidavits in support thereof. As held in ***Ramesh Hirachand Kundanmal*** vs. ***Municipal Corporation of Greater Bombay and others*** (supra), the addition of party in general is not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of the circumstances of a particular case. In the facts and circumstances of the case mentioned above, an effective decree

could be passed in the suit even though the five daughters were not joined as parties. As held in ***Prem Lala Nahata and another*** **vs.** ***Chandi Prasad Sikaria*** (supra), the scheme of Order 1 and the prescriptions therein are in the realm of procedure and not in the realm of substantial law or rights. In the facts and circumstances, it cannot be said that the learned Additional District Judge has committed an error of jurisdiction under any of the clauses (a), (b) and (c) of sub-section (1) of Section 115 of the Code. The refusal to add the five daughters as parties to the suit is based upon a sound exercise of judicial discretion. Therefore, no interference is called for in exercise of the revisional jurisdiction under Section 115 of the Code.

(18) The case of ***Kanakarathanammal*** ***vs.*** ***V.S. Loganatha Mudaliar and another*** (supra) cited by learned counsel for the applicant/defendant No.2 is clearly distinguishable as in that case it was held that the suit filed by the appellant takes the character of a suit for partition and in such a suit the appellant alone would not be entitled to claim any relief against the respondents and it was absolutely essential that all the three heirs, i.e., the sons were before the Court. The present suit is not a suit for partition or for possession and all the five daughters, who were not impleaded as parties, had given affidavits before the Court fully supporting the claim of the mother. Therefore, the non-applicant No.1/plaintiff's claim cannot be rejected on the ground that she has failed to implead her five daughters in the suit.

(19) In ***Rajabibi and others*** ***vs.*** ***S. Ameerali and another*** *(supra)* also, relied on by learned counsel for the applicant/defendant No.2, the suit was for possession of the property repudiating the claim of the

other co-sharers. Placing reliance on ***Kanakarathanammal*** *vs.* ***V.S. Loganatha Mudaliar and another*** (supra), it was held that in the absence of the other co-sharers, the suit would not be maintainable. This case is also clearly distinguishable for the above mentioned reasons and does not come to the aid of the applicant/defendant No.2.

(20) In this view of the matter, I am of the considered opinion that neither there is any jurisdictional error apparent on the face of the impugned order nor has the applicant/defendant No.2 been able to demonstrate that the judicial discretion exercised by the learned Additional District Judge in rejecting the prayer for addition of the daughters as necessary parties to the suit was not a sound exercise of judicial discretion.

(21) In the result, the revision fails and is accordingly dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Gopal